91-518

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MAURICE BRAHMS,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Maurice Brahms
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September 1991

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Questions Presented

1. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court's decision in denying my petition for a writ of error coram nobis without first seeking an evidentiary hearing when U.S. District Judge Tenney relied solely on the record and stated in his opinion "[i]f true, the allegations made by Brahms would raise serious questions about the validity of his plea," (App 23a)?

2. Is my Fifth Amendment constitutional right of due process being denied when my plea of guilty was attained as a result of coercion by an unscrupulous lawyer and a duplicitous Assistant United States Attorney, combined with the repeated denial of an evidentiary hearing to prove these facts?

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OPINIONS BELOW

The unpublished opinion of the court of appeals (App. A) is reported at 932 F.2d 955 (2d Cir. 1991). The opinion of the United States DistrictCourt (App. B) is reported at 746 F. Supp 385.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1991.

A timely petition for rehearing was denied on June 6, 1991 (App. 14A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes which this case involves are as follows :

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. § 7201.

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

I, petitioner Maurice Brahms, pled guilty to two counts of income tax evasion in violation of 26 U.S.C. §7201 admitting in my colloquy the evasion of taxes in the amount of $84,162 for the year 1977 and $389,643 for the year 1978. The plea was made before any indictment and before a Grand Jury was even assembled. Also pleading guilty were three other defendants.I made this plea because I was coerced by threats against my life by my ex attorney Roy M. Cohn and Cohn's partner Tom Andrews, Esq. who were involved in money laundering and tax evasion and whose crimes would have been discovered had the case gone to trial. Peter Sudler,an Assistant United States Attorney who was in the process of leaving office, knowingly allowed them to become part of our

defense team before we discovered who the informers in the case were, and that they were being represented by the same law firm (Sax, Bacon and Bolan) as we were. The details are as follows:

I was in the discotheque business between 1975 and 1980.I came to know two individuals, Steven Rubell and Ian Schrager, who were later introduced to Roy M. Cohn, Esq. by my cousin/partner John Addison. Shortly thereafter (about 1977) Steve and Ian opened their own discotheque called "Studio 54" . On June 28, 1979 they were indicted under 12 different counts and ultimately on Nov. 2, 1979 pled guilty and were sentenced to three and one-half years imprisonment by Judge Owen in the Southern District of New York. Roy Cohn represented one of the defendants, Steven Rubell, at the time of sentencing.

On August 14, 1980 a search warrant was executed at my home as well as at the apartment of (co defendants) John Addison and Fifi Nicholas, and a subpoena served upon a third , Jay Levey. During the course of the search of Addison's and Nicholas' apartment they called the office of Roy Cohn (Sax, Bacon & Bolan). Tom Andrews,Esq. and Michael Rosen, Esq. appeared at their apartment and were promptly asked to leave because of a potential conflict of interest.

Not knowing at the time that Steve and Ian were the informers, Cohn and Andrews were hired to represent my co-defendants and sat in at all of the meetings with me and all the other co-defendants. This continued until the Affidavit for the search warrant was procured and it was discovered not only

that our attorneys were the same as the informants Steve and Ian, but that the information for the most part came from our attorneys rather than the informants.

Upon this realization Cohn and Andrews were immediately dismissed after a heated argument between Cohn and myself in the presence of several of the other lawyers and defendants. Yet, Assistant United States Attorney Peter Sudler continued to conspire with our dismissed counsel.

Just as we were about to begin a multi faceted attack on both the sources and the blatant misinformation contained in both the Affidavit and the search warrant, a message was relayed to me by my two co defendants (John and Fifi) from

Tom Andrews and Roy Cohn. The message was that if I did not plead guilty that the lives of my family and myself were in danger. Simultaneously, Assistant United States Attorney Peter Sudler informed my attorney James La Rossa that if I did not plead guilty he was prepared to indict me for threatening to kill Rubell & Schrager (the informers then incarcerated) and would charge me on every technicality he could conjure up. Also, this plea had to take place **without** any challenge to the search warrant.

After much soul searching and discussion of my dilemma with close friends and people knowledgeable in such matters, I pled guilty to the aforementioned two counts of tax evasion. I was never given a chance to dispute either the basis of the government's figures nor a book dated five years

before which was never listed in the warrant but was seized and treated as evidence of tax evasion. I was sentenced to three years incarceration and served from January 1981 -January 1983.

Except for one occasion when my suffering overcame my fear, the same concerns that lead to my coerced plea prevented me from coming forward with all the facts. At that time I asked my new attorney (Elkan Abramowitz) to inform Assistant United States Attorney Sudler that I had information I wished to divulge concerning Roy Cohn. Mr. Sudler refused to hear this information, as attested to in an Affidavit by Mr. Abramowitz. I became determined that once Mr. Sudler left office and should Mr. Cohn die I would make the truth known.

Sometime in 1986 I became aware that Cohn was dying of Aids, and I immediately began my legal battle. On July 22, 1986 Roy Cohn did in fact die. That same month I immediately began an action against Peter Sudler for disbarment. During those several months of correspondence, which resulted in no investigation taking place, I almost gave up hope of ever achieving justice. I did not have the money to mount a full fledged legal attack in federal court, nor could I find a competent attorney who was willing to undertake such a proceeding. Then I came across John Klotz, Esq., who was willing to undertake the challenge for a small fee.

In July of 1989 I retained Mr. John Klotz, Esq. and several months later he submitted an error coram nobis on my behalf. In it he alleged (1) that my guilty

plea was coerced by Cohn's threats of violence; (2) that Cohn supplied privileged information to the government that was used to obtain a search warrant; (3) that my defense was subverted by the prosecutor's relationship with Cohn, Rubell & Schrager (4) that my guilty plea was coerced by Assistant United States Attorney Sudler's threats to indict me for blatantly false threats to kill those supplying the information leading to my predicament as well as several other allegations all of which were deemed not relevant except the one alleging coercion by Cohn.

Although I submitted evidence relating to most of my allegations, I did not submit Affidavits from those familiar with the threats. Not being aware of what the district court would or would not deem significant, I stated the various issues involved

and i stated that " I assure the court that witnesses and/or documentation are available to prove every fact."

My error coram nobis was denied by the district court based on what was in the record, although the court acknowledged that if I were able to prove my allegations my plea of guilty would indeed be suspect. (App 12A). The Court of Appeals unanimously concurred with the district court.(App A).

ARGUMENT

I. In a coram nobis motion the denial of an evidentiary hearing cannot be based solely on what is already in the record, particularly when coercion is alleged on a guilty plea.

A. A coerced plea amounts to a material issue of fact raising a claim of constitutional dimensions.

Judge Tenney, United States District Court, Southern District of New York, in his decision denying me an evidentiary hearing (App. B) states "[i]f true, the allegations made by Brahms would raise serious questions about the validity of his plea." (App. 12a). He continues to say, "[n]evertheless, considering the evidence already in the record, the court does not see how he would be able to establish his assertions, even with the benefit of an

evidentiary hearing." (App 12a). The United States Court of Appeals for the Second Circuit, in correctly determining the issue on appeal to be "whether the district court erred in denying Brahm's petition without first conducting an evidentiary hearing" (App 2A) wrongly affirmed the district court's decision citing United States v Carlino, 400 F.2d 56,58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969) and Bruno v. United States, 474 F.2d 1261,1263 (8th Cir. 1973).

The Second Circuit cites Carlino for the premise that for a remedy of coram nobis a petitioner is entitled to an evidentiary hearing "only if he raises a material issue of fact on a claim of constitutional dimensions." (App. 2A). However, in Carlino the defendant made an allegation of coercion based on his understanding that charges against his son would be

dismissed [not based on fear of bodily harm] Id at 58. The court in Carlino decided that charges against his son "did not, in itself, amount to a sufficient allegation of coercion." Id at 58.

There seems to be no question either by the United States District Court of the Southern District of New York or the United States Court of Appeals for the Second Circuit that a coerced plea, if true, would amount to a material issue of fact raising a claim of constitutional dimension. It has been well established law decided by this Court, for almost fifty years, that a coerced plea implicates the rights against self incrimination and due process protected by the Fifth Amendment of the United States Constitution.

> "[a] conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession... And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of a validity as a waiver of his right to assail the conviction. Johnson v Zerbst, 304 U.S. 458, 467." Waley v. Johnston, 316 U.S. 101,104 (1942).

I am stating emphatically that I entered my plea of guilty, some eleven years ago, because I was coerced by threats of violence made to my family and myself by Roy M. Cohn and his associate Tom Andrews.

Cohn was an unscrupulous lawyer with specific interests in this case as was his intermediary. The coercion extended to Peter Sudler, the Assistant United States Attorney in this case, who acted in concert with Mr. Cohn. I have stated that these

allegations can be corroborated, though Roy Cohn is no longer alive, because all the other persons are alive and are available to testify. However, without the benefit of the evidentiary hearing I am seeking, my efforts in the least are futile and at most the continued denial is constitutionally unjust.

B. The United States Court of Appeals for the Second Circuit relies on cases to support its argument that are not binding on its Circuit, have no factual similarities and stand for premises of law that are irrelevant to what is at issue.

The next point of law that the Court of Appeals raises citing Bruno v. United States, 474 F.2d 1261, 1263 (8th Cir. 1973) is that "[t]he district

court has broad discretion to weigh the adequacy of the proof in support of an application, and its findings will not be reversed if supported by adequate proof in the record." (App. 2A). There are several problems in the Court of Appeals relying on Bruno for this premise.

First, the defendant Bruno claimed that he wasn't represented by competent counsel when entering his plea of guilty. Upon examination of the record the court found that a competent attorney had in fact represented Bruno. Id at 1262. In Bruno there is explicit evidence in the record contradicting his claim. **In my case there is not (emphasis added).**

Secondly, almost forty years had elapsed since Bruno entered his plea making an evidentiary hearing all but impossible. Id at 1262, 1263. In my case only ten years have elapsed and as stated earlier all but one of the necessary parties are available to testify. The lack of testimony by that party (Roy Cohn) is not necessary to my being able to prove my allegations.

Thus, even if Mr. Cohn were alive today and he denied ever making the threat as it was relayed to me, but if I believed the threat to be true and based my plea on it, my plea would be every bit as invalid as if the threat were in itself true. United States v. Colson, 230 F. Supp. 953 (1964). Finally, Bruno was decided by the United States Court of Appeals for the Eighth Circuit. Had the facts in Bruno been even somewhat similar to mine (which they are not,

excepting for the fact that he was seeking coram nobis relief) the Court of Appeals for the Second Circuit may then have used Bruno for persuasive argument. However, the fact remains that an Eighth Circuit decision is not binding on the Second Circuit. The Court of Appeals for the Second Circuit is relying on a case for its authority that holds no legal precedent in the Second Circuit and whose facts are in no way related to mine.

United States District Judge Tenney stated, which the United States Court of Appeals for the Second Circuit affirmed, relying on Bruno, which held no legal precedent in the Second Circuit and had no factual similarities, "considering the evidence already in the record, the court does not see how he [Brahms] would be able to establish the truth of his

assertions, even with the benefit of an evidentiary hearing." (App 12a). **It appears that the court is looking for existing evidence in the record to prove my allegations. It is not saying there is proof in the record refuting my allegations as was the case in Bruno, it is instead saying there isn't evidence in the record to support my allegations (emphasis added).** Of course not! That is why I am seeking the evidentiary hearing, as opposed to asking for relief based solely on the record.

C. This Court stands for the premise that a coerced plea raise grave questions of due process that ought not to be dismissed without hearing.

The matters I allege involve the coercion of my plea by occurrences outside the transcript of proceedings. This Court has been quite clear and consistent in its holdings that allegation of a coerced plea raise grave questions of due process that ought not to be dismissed without hearing. Where matters outside the record are alleged, the District Court's incredulity may not be a basis for denying a hearing. This Court has recognized that the Court may not on the basis of the very record attacked, deny the application without a hearing even if the allegations "tax credulity". Waley v Johnston, supra, 316 U.S. at 104.

The individuals who conveyed the threats to me concerning the harm that would befall myself and my family if I did not plead guilty are available as

witnesses, albeit unfriendly ones. The district court was not a witness to those threats and to dismiss them under these circumstances as though they never occurred without first permitting an evidentiary hearing is not based on any established principal of law. In Machibroda v U.S., 368 U.S. 487, 494-495 (1962) this Court held:

> " ... The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed by the government's response,related primarily to purported occurrences outside the courtroom and upon which the record could therefore cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing on his own personal knowledge or recollection." 368 U.S. at 494-495 (emphasis added)

The Court of Appeals cites Bruno and Carlino again for its authority that "[w]here an application for a writ of coram nobis lacks an adequate foundation,

the proper course is to dismiss the case without further proceedings." (App 2A). Once again Bruno is not binding and neither case bears any similar factual foundation to my case. Furthermore, without an evidentiary hearing there cannot be adequate factual foundation for all the aforementioned reasons.

II. The Court of Appeals for the Second Circuit continues to misquote the law.

A. The burden is on me to overcome a presumption, as opposed to a strong presumption, that the prior proceedings were correct.

Deeply troubling are the premises that I must overcome a strong presumption that the prior proceeding were proper and that this presumption is particularly difficult to overcome when the challenged conviction rests on a plea of guilty with an allegation of coercion. (App. 3A). All the authority (with the exception of one for the former premise, that being U.S. v Morgan, 346 U.S. 502, 512 (1954)) is authority not binding on the Second Circuit; Klein v. U.S. ,880 F.2d 250,253 (10th Cir. 1989); U.S. v Osser, 864 F.2d 1056,1059 (3rd Cir. 1988);Bruno, supra (8th Cir.);

Deaton v. U.S. 480 F.2d 1015, 1016- 17 (8th Cir. 1973);Ybarra v. U.S.,461 F.2d 1195, 1198-99 (9th Cir. 1972); Payne v. U.S., 422 F.2d 376,377 (3d Cir. 1970) (App 3A).

While I recognize that the plea bargaining process is necessary in order for our justice system to function, I question the court's premise that the burden is on me to overcome a strong presumption that the prior proceedings were proper. If the Court will but grant me for the moment the supposition that what I allege is true, how can I or any future citizen put in this position be able to overcome such an insurmountable obstacle before even beginning to present irrefutable evidence? Overcoming a mere presumption, as this Court correctly states in Morgan, should be sufficient.

B. This Court in correctly stating the law concludes that coram nobis is the proper remedy to correct errors of fact and that coercion is grounds for coram nobis.

The only case that was cited for the premise that I must overcome a strong presumption that the prior proceedings were proper that has binding authority is Morgan. However, in Morgan, this Court stated:

> "[t]he writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the validity and regularity of the judgment, and was used in both civil and criminal cases. ..., no one doubts its availability at common law." Id at 507. Furthermore, "[i]t (coram nobis) has been used, in the U.S., with and without statutory authority but always with reference to its common law scope- for example,... a conviction on a guilty plea through the coercions of fear...." Id at 508.

These two premises decided by this Court correctly state that coram nobis is the proper remedy and that coercion is grounds for coram nobis. The Second Circuit does not point this out. What it does

state citing Morgan is that "I must overcome a strong presumption that the prior proceedings were proper." (App. 3A). How can one do this when coerced? What proof can possibly be found in the record to show that the prior proceedings were not proper when the irregularity stems from something beyond the proceeding itself? If in order to be given an evidentiary hearing regarding a guilty plea alleged to be derived from coercion, one must show first strong evidence of that in the record, then the standard is virtually impossible to ever overcome except in the most bizarre circumstances imaginable. In such a circumstance it is likely the sentencing court would immediately intervene and the plea would not be accepted. This catch 22 prevents legitimate evidence and testimony from ever coming forth, and protects those issuing the threats at the expense of the

intimidated party.

What Morgan correctly states in regard to the motion of coram nobis is that "[i]t is presumed the [prior] proceedings were correct and the burden rests on the accused to show otherwise." Id at 512. To presume that the proceedings were correct is a far cry from stating that a strong presumption must be met. Each premise holds a different meaning under the law and to state one instead of the other is misleading and confusing.

I am asking for my right to be allowed to overcome the burden of proving, in an evidentiary hearing, that the proceedings were under the guise of coercion. Therefore, I ask this Court to refute the Second Circuit's language that I must overcome a

strong presumption that the prior proceedings were correct.

C. The Court of Appeals for the Second Circuit relies on false perceptions.

The Court of Appeals for the Second Circuit goes on to call into question my plea (App 3A). Isn't that what this entire matter is about? I do not deny that I did indeed plead guilty. What I question is not having the opportunity to conclusively prove that my plea was entered into as a result of coercion. The Court of Appeals for the Second Circuit is denying me that right based on precedent that is either different in factual basis, not binding on its Court, or is relying on a record that states, "[the district judge] saw nothing to call into question the propriety of the proceedings or the voluntariness of [my] actions."

However, the district judge also stated that "[I]n addition, it can think of no reason why LaRossa, an experienced criminal defense attorney, would not have brought brought his client's alleged concerns to the court's attention." (App. 3a). Yet , I possess a letter from Mr. LaRossa's partner stating that he did in fact ask the sentencing judge to speak with him in a pre sentence conference but was refused. (App.3a). This was preceded by an earlier attempt on my part to change counsel after I discovered that my counsel and Roy Cohn were good friends. I was talked out of this decision by his law partner (Judge Bobby Brownstein). The crux of the issue is how could the district judge have read the thought processes in my mind that preceded my words? Only an evidentiary hearing can properly determine the facts surrounding my decision to enter

a guilty plea.

III The Fifth Amendment of the Constitution of the United States guarantees no deprivation of life, liberty or property without due process of law.

A. There is continued denial of liberty and property without due process.

The Fifth Amendment of the Constitution of the United States states that "[N]o person shall be deprived of life, liberty or property without due process of law." I have already been deprived of three years of my liberty without due process. I do not seek to redress that harm. What I do seek is to stop any further deprivation which now threatens me, namely,

denying me my property without receiving my constitutionally guaranteed due process.

At this point it is important for the Court to understand that I do not claim to be innocent of tax evasion to any degree. Understanding the complete necessity for our tax system I am truly remorseful for any monies I may have deprived the Treasury of more than ten years ago. However, I emphatically state that that I am innocent of the egregious amount of monies that I was coerced into pleading guilty to. (Emphasis added). The payment of this sum, which has no basis in fact, would render me a lifelong prisoner (an indentured servant) to the government. This will occur should I lose my coram nobis motion. This is tantamount to depriving me of further liberty, as well as deprivation of property without first having

availed myself of proper due process as afforded by our Constitution. **This denial of due process amounts to a departure from the accepted and usual course of judicial proceedings and has resulted in the continued double deprivation of my property and liberty that I now ask this Court to redress. (Emphasis added).**

B. This Court has overruled the Court of Appeals basis for its affirmation.

The United States Court of Appeals for the Second Circuit further errs in its decision when it cites the United States District Court's decision of U.S. v. Morgan, 39 F.R.D. 323,325-26 (N.D. Miss 1966) that this Court overruled in U.S. v. Morgan, supra at

502. It states that a defendant should at least profess innocence. (App. 4A).

It has long been established by this Court that when considering Fifth Amendment claims, the question of the defendant's guilt or innocence is not at issue. In Kercheval v. U.S., 274 U.S. 220 (1927), this Court held:

> "[O]n timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance,fear,or inadvertence. Such an application does not involve any question of guilt or innocence." (Emphasis added) 274 U.S. at 224.

The issues of coercion and due process implicate the Fifth Amendment. The issue of my guilt or innocence is irrelevant. (Emphasis added).

For the aforementioned reasons the United States Court of Appeals for the Second Circuit erred in affirming the district court's decision to not allow an evidentiary hearing based on what was solely in the record. Furthermore, since I haven't been given the opportunity in an evidentiary hearing to prove my allegations, then my plea remains highly suspect, if not void ,as my Constitutional right of due process is continually being denied. (Emphasis added).

CONCLUSION

For the foregoing reasons, I, petitioner, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted

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August 1991

APPENDIX

APPENDIX A

SDN
80-cr-620
Tenney, D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of April, one thousand nine hundred and ninety one.

Present: Hon. James L. Oakes,

Chief Judge,

Hon. Amalya L. Kearse,

Hon. Joseph M. McLaughlin,

Circuit Judges.

United States of America,

Appellee,

v. 90-1623

Maurice Brahms,

Defendant-Appellant.

ORDER

Maurice Brahms appeals from an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge, denying his petition for a writ of error coram nobis. For the reasons set forth below, we affirm.

On December 4, 1980, Brahms was fined $20,000 and sentenced to three years' imprisonment and three years' probation under a judgment of conviction

entered upon Brahm's plea of guilty to two counts of income tax evasion. Nearly ten years later, having completed his sentence and paid his fine, Brahms moved to vacate his conviction by writ of error coram nobis, alleging various misdeeds by his former attorney, Roy Cohn, and by the Government, in connection with his prosecution and guilty plea. Specifically, Brahms alleged (1) that his guilty plea was coerced by Cohn's threats of violence; (2) that Cohn supplied privileged information to the Government that was used to obtain a search warrant; (3) that his defense was subverted by the prosecutor's relationship with Cohn; (4) that the terms of a supposed plea agreement were omitted from the record of his plea in violation of Rule 11 of the Federal Rules of Criminal Procedure; and (5) that he was the victim of selective and vindictive

prosecution.

After considering the prior proceedings and the affadavits submitted in connection with the petition, Judge Tenney denied Brahms's petition without an evidentiary hearing. In an opinion dated October 9, 1990, Judge Tenney concluded that Brahms had "not proffered sufficient evidence of coercion" of his plea to warrant an evidentiary hearing, and found all of Brahms's remaining allegations "to be without merit". The issue on appeal is whether district court erred in denying Brahms's petition without first conducting an evidentiary hearing.

A petitioner seeking the extraordinary remedy of coram nobis is entitled to an evidentiary hearing "only

if he raise [s] a material issue of fact on a claim of constitutional dimensions." United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S 1013 (1969). Where an application for a writ of coram nobis lacks an adequate factual foundation, the proper course is to dismiss the case without further proceedings. See, e.g, id.; Bruno v. United States, 474 F.2d 1261, 1263 (8th Cir. 1973). The district court has broad discretion to weigh the adequacy of the proof in support of an application, and its findings will not be reversed if supported by competent evidence in the record. See Bruno, 474 F.2d at 1263.

On the record in this case, Judge Tenney acted well within his discretion in denying Brahms's petition without a hearing. As a petitioner for coram nobis relief, Brahms must overcome a strong presumption

that the prior proceedings were proper, see United States v. Morgan, 346 U.S. 502, 512 (1954); Klein v. United States, 880 F.2d 250, 253 (10th Cir. 1989); United States v. Osser, 864 F.2d 1056, 1059 (3d Cir. 1988); Bruno, 474 F. 2d. at 1263, a presumption that is particularly difficult to overcome when the challenged conviction rests on a plea of guilty, see, e.g., Deaton v. United States, 480 F. 2d 1015, 1016-17 (8th Cir. 1973) (per curiam); Ybarra v. United States, 461 F.2d 1195, 1198-99 (9th Cir. 1972); Payne v. United States, 422 F.2d 376, 377 (3d Cir. 1970) (per curiam). We agree with the district court that

Brahms's belated, uncorroborated [1] allegations of irregularities preceding his plea do not provide an adequate factual foundation to call into question the record established at his plea and sentencing proceedings, to which we accord a presumption of regularity. Brahms swore under penalty of perjury that his plea was voluntary, and that he was in fact guilty. Judge Tenney presided over the plea colloquy himself, and saw nothing to call into question the propriety of the proceedings or the voluntariness of Brahms's actions. Because Brahms has provided no reason to believe that his new allegations are more credible than his statements of voluntariness and

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[1] As the district court found, the lack of corroborating testimony from James LaRossa, Brahms' attorney at the plea who, according to Brahms, was aware of the coercion by Cohn, renders Brahms's allegations "particularly suspect."

contrition of ten years ago, the district court properly refused to overturn Brahms's plea. See Carlino, 400 F.2d at 58; United States v. Smith, 257 F.2d 432, 434-35 (2d Cir. 1958), cert. denied, 359 U.S. 926 (1959).

We also note that Brahms's failure to profess his innocence, [2] coupled with his repeated admissions of criminal responsibility and earnest expressions of remorse at the time of his plea and sentencing, suggest that there has not been a manifest miscarriage of justice such as would merit coram nobis relief. See United States v. Norstrand Corp., 168 F.2d 481, 482 (2d Cir. 1948) ("[W]hen a defendant who has pleaded guilty makes [a coram nobis or Rule 32 (d)] application to withdraw his plea, he should at the very least allege that he was not guilty of the

[2] At most, Brahms has contested the amount of the taxes he illegally avoided.

charge to which he pleaded."). Cf. United States v. Morgan; 39 F.R.D. 323, 325-26 (N.D. Miss. 1966) (rejecting Rule 32 (d) motion where defendant did not profess innocence).

Accordingly, the order of the district court is affirmed.

JAMES L. OAKES, Chief Judge

AMALYA L. KEARSE, Circuit Judge

JOSEPH M. McLAUGHLIN, Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-against-

MAURICE BRAHMS

Defendant.

----------X

APPEARANCES

For the Government:

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Of Counsel: MICHAEL D. PINNISSI
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TENNEY, District Judge

This case is before the court on the defendant's writ of error coram nobis, in which he seeks to vacate his guilty plea to tax fraud. For the reasons set forth below, the writ is denied.

BACKGROUND

In 1980, a federal grand jury began an investigation into possible tax fraud by the owners of several discotheques in New York City. Maurice Brahms, the defendant in this action, was the owner of two such establishments, "New York, New York" and "Infinity". Prior to the investigation, Brahms had retained a lawyer, the late Roy Cohn, to provide general legal services for his discotheque businesses. When the grand jury investigation began, Cohn was retained by Ian Schrager and Steve Rubell, the owners of the discotheque "Studio 54," who had become targets of the investigation. When Brahms learned

that he was also a target, he retained another attorney, James LaRossa, to represent him.

Brahms eventually waived indictment and pleaded guilty to two counts of tax fraud. He did not file any motions prior to entry of his plea; he swore to all facts and waivers at the time of the plea, as required by Federal Rule of Criminal Procedure 11; and he did not appeal his conviction. He also admitted that he had concealed $1,066,449 in income from the United States, with a tax due and owing of $670,095. The court sentenced him to three years in prison, three years' probation and a fine of $20,000.

In this motion, Brahms asserts several grounds for invalidating his plea, only one of which merits discussion. Essentially, he contends that Cohn violated his attorney-client relationship with Brahms by supplying the Government with privileged and

incriminating information about Brahms' activities. Brahms claims that Cohn did this to gain more favorable treatment for Cohn's other clients, Rubell and Schrager. According to Brahms, the Government used this information to obtain a search warrant that was executed at his home, netting much of the evidence against him. Brahms maintains that Cohn's alleged misconduct provided grounds to have the evidence suppressed. He claims, however, that he elected not to pursue the issue and decided to plead guilty after receiving threats from Cohn, through an intermediary, warning him that his family would be harmed if he challenged.

DISCUSSION

Under Federal Rule Criminal Procedure 12 (f), "[f]ailure by a party to raise defenses or objections or

to make requests which must be made prior to trial... shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." Therefore, absent good cause, the failure to challenge a search warrant before pleading guilty ordinarily bars any consideration of the merits of such a challenge in a collateral attack on the judgment of conviction. See Davis v. United States, 411 U.S. 233, 242 (1973); Indiviglio v. United States, 612 F.2d 624, 630 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980). Standing alone, Brahms's allegations would establish a colorable argument for good cause and, were they presented in a habeas petition, might compel the court to hold an evidentiary hearing, or to require the Government to respond to Brahms' contentions with appropriate affidavits. See Blackledge v. Allison, 431 U.S. 63, 80 & n.21, 82-83 & n.25 (1977).

Nevertheless, Brahms has asserted his claims in a petition for writ of error coram nobis because he has fully completed his sentence and does not face the potential loss of liberty required to bring a habeas petition under 28 U.S.C. 2255 (1988). The Supreme Court has noted that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through [the] extraordinary remedy [of writ of error coram nobis] only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502, 511 (1954); see also Blackledge, 431 U.S. at 83 (Powell, J. concurring) (noting the importance of finality to a system of justice). Therefore, in contrast to the weight that it must accord allegations in a habeas petition, the court may consider the previous proceedings of the case

underlying a coram nobis action and reject those contentions in the petition that, in its judgment , are palpably implausible in light of the competent evidence already in the record. See Bruno v. United States, 474 F.2d 1261, 1263 (8th Cir. 1973) ; see also Machibroda v. United States, 368 U.S. 487, 495 (1962) ("The language of [section 2255] does not strip the district courts of all discretion to exercise their common sense.") ; Dalli v. United States, 491 F.2d 758, 762 n.6 (2d Cir. 1974) (same). If the interests of justice would best be served by doing so, it may summarily deny relief without an evidentiary hearing. See Bruno, 474 F.2d at 1263.

The justification for examining the entire record results, in part, from a recognition that the interests involved in a coram-nobis action are, as in this case, usually less significant than the liberty interest

implicated in a habeas petition. Indeed, Brahms claims only that he has reentered the nightclub business and that his conviction prevents him from procuring a liquor license. He also claims that he cannot obtain a real estate license and that his permit to carry a firearm has been revoked. Although these, and the general stigma associated with a criminal conviction, are obviously important considerations to Brahms, they do not rise to the level of the liberty interests at stake in a habeas petition.

Moreover, Brahms contends only that he was denied the right to challenge the validity of the search warrant that provided the evidence against him. Such claims "do not impugn the integrity of the fact-finding process or challenge the evidence as inherently unreliable; rather, the exclusion of

illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." Stone v. Powell, 428 U.S. 465, 479 (1976) (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)). Therefore, Brahms' contentions pertain not to his factual guilt or innocence, but only to whether he was denied the opportunity to avail himself of a judicial remedy created to serve larger societal goals.

Examining these contentions against the history of this case, the court concludes that an evidentiary hearing is not warranted. Brahms claims that he was intimidated by Cohn, and pleaded guilty only because he feared for the safety of his family. When the court accepted his plea, however, Brahms stated under oath that he had not been coerced. Plea transcript at 2 (Declaration of Michael D. Pinnisi, dated April 26,

1990, Exhibit A). He now suggests that he told his attorney, LaRossa, that he was not freely entering into the plea agreement and that he wanted to inform the court "of the violations of my rights and the fear of collaboration" between Cohn and the Government. Reply Affidavit of Maurice Brahms, sworn to May 14, 1990, ¶ 5. Brahms claims that LaRossa told him that the court would not want to hear his statements. Id. He states that after La Rossa discouraged him from bringing his concerns to the court's attention, he "stuck with the script" and pleaded guilty. Id. The court does not recall any irregularities in the proceedings when Brahms entered his plea. In addition, it can think of no reason why LaRossa, an experienced criminal defense attorney, would not have brought his client's alleged concerns to the court's attention. The absence of any corroborating

affidavit from LaRossa renders Brahms' characterization of the substance of conversations between them at the time of the plea particularly suspect.

Brahms did go to the effort of procuring an affidavit from an attorney that he subsequently retained, Elkan Abramowitz. See Affidavit of Elkan Abramowitz, sworn to May 11, 1990 (Brahms Reply Aff. Exh. Q). In 1981, Abramowitz prepared Brahms' unsuccessful Rule 35 motion to reduce his sentence. Presumably, Brahms discussed the history of the case with Abramowitz before the motion was prepared. It would seem reasonable to assume that Brahms, who allegedly believed he was sitting in prison on the basis of a coerced plea, would have mentioned the threats to Abramowitz. Yet, there is no

mention in Abramowitz' affidavit of any such discussions. Indeed, the Rule 35 motion itself was filled with statements such as:

> Since the inception of his legal difficulties, Mr. Brahms recognized his wrong and has made every effort to spare his family the embarrassment and agony of a long drawn out affair. When finally confronted with his transgressions, he chose not to deny his guilt, but rather to accept his punishment and get on with his life. Although his attorney was prepared to move for suppression of the records forming the basis of the charges against him which were seized pursuant to a search warrant, Mr. Brahms chose to save the government the time and expense of a lengthy litigation and decided to forego any possible legal defenses, waive waive an indictment and plead guilty to an information.....
>
> .....Mr. Brahms is truly contrite over his participation in these crimes.

Memorandum in Support of Defendant's Motion to Reduce Sentence, docketed April 1, 1981, at 8-9.

The lack of prior corroboration for Brahms' claims is particularly significant. Brahms suggests now that he was so fearful of Cohn, while he was alive, that he could not reveal the threats to anyone. That claim is

difficult to reconcile with Brahms' own behavior before Cohn's death; he apparently had no qualms about revealing his alleged concerns to LaRossa before pleading guilty. In addition, Brahms has not provided any reason for waiting several years until after Cohn died to come forward with his claims. One would have thought that once Cohn passed away, and the potential threat was removed, Brahms would have immediately rushed forward with the arguments he so fervently presses now,

If true, the allegations made by Brahms would raise serious questions about the validity of his plea. Nevertheless, considering the evidence already in in the record, the court does not see how he would be able to establish the truth of his assertions, even with the benefit of an evidentiary hearing. Therefore,

there is no reason to burden the Government with the necessity of preparing for, and participating in, such a hearing.

CONCLUSION

Brahms has not proffered sufficient evidence of coercion to overcome the previous record establishing that he freely pleaded guilty and waived his right to contest the warrant. The court has considered his other arguments and finds them to be without merit. Accordingly, the application for a writ of error coram nobis is denied.

So ordered.

Dated: New York, New York

October 9, 1990

CHARLES H. TENNEY, U.S. D.J.

In light of the disposition of the petition on this ground, the court does not address whether Brahms' allegations concerning violation of the attorney-client privilege would, if true, be a valid basis for controverting the warrant.

APPENDIX C

UNITED STATES COURT of APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the day of June , one thousand nine hundred and ninety-one.

UNITED STATES OF AMERICA

Appellee,

v. DOCKET NUMBER: 90-1623

MAURICE BRAHMS,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant-pro-se

MAURICE BRAHMS

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk